No. 90-97

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

AMERICAN HOSPITAL ASSOCIATION,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

The Health Care Amendments Act of 1974 repealed the exemption of most hospitals from the National Labor Relations Act. In taking that action, Congress admonished the National Labor Relations Board to give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry." Pet. App. 8a. Ever since, the Board's attempts to apply to the health care industry the same bargaining unit standards it applies in other industries have met with failure. The courts of appeals have rejected the Board's determinations, usually on the ground that they failed to give proper weight to the congressional admonition against proliferation. Responding to this "dismal background" (*id.* at 15a), in 1987 the Board for the first time in its history decided to engage in formal, substantive rulemaking. The rule it issued provides that eight specific bargaining units (and only those units) are appropriate for every acute-care hospital in the country. The questions presented are:

1. Whether the National Labor Relations Board's rule determining that eight specific bargaining units are appropriate for every acute-care hospital contravenes the requirement of Section 9(b) of the National Labor Relations Act (29 U.S.C. § 159(b)) that "[t]he Board shall decide [the appropriate bargaining unit] in each case."

2. Whether the rule is consistent with the Health Care Amendments Act of 1974 and the congressional admonition to "prevent[ ] proliferation of bargaining units in the health care industry."

3. Whether the rule is arbitrary and capricious and not based on substantial evidence insofar as it ignores the critical differences among the more than 4,000 private, acute-care hospitals in the United States.

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the following entities and individuals were appellants in the court of appeals and are respondents in this Court:

James M. Stephens
Mary Miller Cracraft
Dennis M. Devaney
Clifford R. Oviatt, Jr.*
John N. Raudabaugh*
John C. Truesdale
American Nurses Association
American Federation of Labor and Congress of Industrial Organization
Building and Construction Trades Department, AFL-CIO

* Substituted as a respondent pursuant to Rule 35.3 of the Rules of this Court. Former Board Member John E. Higgins, Jr., was an appellant in the court of appeals.

Pursuant to Rule 29.1 of the Rules of this Court, petitioner American Hospital Association states that it has no parent or subsidiary companies (other than wholly-owned subsidiaries).

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JURISDICTION

The judgment of the court of appeals was entered on April 11, 1990 The petition for a writ of certiorari was filed on July 10, 1990, and was granted on October 9, 1990. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b), and the National Labor Relations Board's Final Rule for Collective-Bargaining Units in the Health Care Industry, 54 Fed. Reg. 16347-16348 (1989), 29 C.F.R. § 103.30, are set forth at Pet. App. 43a-46a. The Board's Notice of Proposed Rulemaking, 52 Fed. Reg. 25142 (July 2, 1987), Second Notice of Proposed Rulemaking, 53 Fed. Reg. 33900 (Sept. 1, 1988) and Final Rule are set forth at J.A. 3-262.

STATEMENT

From 1947 until 1974, most hospitals were excluded from the coverage of the National Labor Relations Act.[1] When Congress amended the law in 1974 to encompass all pri-

[1] Before 1974, the Act excluded nonproprietary (*i.e.*, private, not-for-profit) hospitals. They comprise nearly 83% of all private hospitals. American Hospital Ass'n, *Hospital Statistics* 207 (1989-90 ed.). Public employers, including hospitals, remain excluded from the Act. 29 U.S.C. § 152(2).

vate hospitals, it specifically instructed the National Labor Relations Board that in carrying out its statutory obligation to "decide in each case" the appropriate unit for collective bargaining, it should give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6-7 (1974). From 1974 until 1987, the Board's hospital bargaining unit determinations repeatedly were rejected by the courts of appeals, usually on the ground that the Board had ignored the congressional admonition against proliferation of bargaining units.

Clearly frustrated by its failure in the courts (Pet. App. 15a), in 1987 the Board engaged in "the first significant substantive exertion of [its] rulemaking powers." *Id.* at 1a. The rule it ultimately issued provides that eight specific bargaining units are the only appropriate units for all acute-care hospitals regardless of their size, location, or differences in their staffing and operation. Petitioner American Hospital Association ("AHA") successfully challenged the bargaining unit rule in the district court, which held that the Board once again had failed to follow the congressional admonition. But the court of appeals—following an approach that differed markedly from that of other courts of appeals in health care bargaining unit cases—reversed and upheld the rule.

This Court granted AHA's petition for certiorari to determine whether the Board's rule is consistent with the "in each case" requirement of Section 9(b) of the NLRA and with the congressional admonition against bargaining-unit proliferation, and to decide whether, by disregarding the many differences among hospitals, the Board's rigid bargaining-unit rule is arbitrary and capricious.

1. The National Labor Relations Act authorizes "[r]epresentatives designated or selected * * * by the majority of the employees in a unit appropriate for such purposes" to serve as "the exclusive representatives of all the employees in such unit for the purposes of collective bargaining * * *." 29 U.S.C. § 159(a). The Act expressly provides that the question of what unit is "appropriate for such purposes" must be decided by the National Labor Relations Board "in each case":

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

Ibid.

As originally enacted in 1935, the Act covered all private hospitals. But in 1947, as part of the Taft-Hartley Act, Congress amended the definition of "employer" to exclude "any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual." 29 U.S.C. § 152(2) (repealed, 1974). The exclusion was seen by its sponsors as necessary to "enable [nonprofit institutions] to keep the doors open and operate the hospitals." NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 1464 (Reprint ed. 1985).

The Health Care Amendments Act of 1974 repealed the exemption of nonproprietary hospitals.[2] That Act was the product of a legislative process that lasted two years. In

[2] In 1967, the Board reversed its previous position that private, proprietary hospitals were not engaged in interstate commerce and therefore were not covered by the Act. *Butte Medical Properties*, 168 NLRB 266, 268 (1967); *University Nursing Home, Inc.*, 168 NLRB 263 (1967). But because more than 80% of private hospitals are nonproprietary (see American Hospital Ass'n, *Hospital Statistics* 20), that ruling did not lead to much organizing activity among hospital employees.

1972, a House bill that simply would have repealed the hospital exemption failed to make it out of committee in the Senate. Among the Senate opponents of the bill was Senator Robert Taft, Jr. Unlike other opponents of the bill, Senator Taft did not object to extending collective bargaining rights to hospital employees, but believed that the industry warranted special protection "to minimize work stoppages and to insure safe patient care." *Hearings on S. 794 and S. 2292 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 93d Cong., 1st Sess. 75 (1973) (hereinafter "*1973 Hearings*").

In 1973, Senator Taft sponsored a new bill (S. 2292) that would have designated four bargaining units as appropriate in all health care institutions: professionals, technicians, office clericals, and other nonprofessionals (*i.e.*, service and maintenance employees). *Legislative History of the Coverage of Nonprofit Hospitals Under the National Labor Relations Act, 1974* (hereinafter referred to as "*1974 Leg. Hist.*"), at 457-458. Under the bill, the Board could not approve narrower units without the consent of the employer. *Ibid.* But Senator Taft's bill was opposed as overly rigid and unduly restrictive of the flexibility of the Board to determine health care bargaining units on a case-by-case basis taking into account the particular situation at each hospital. *Id.* at 113-114.[3]

In light of these objections, Senator Taft sponsored a compromise bill that became the Health Care Amendments Act of 1974. *1974 Leg. Hist.* at 462. The bill did not limit the Board's prescribed flexibility to determine the appropriate bargaining unit "in each case," but the sponsors agreed that the following language should appear in both the Senate and the House Reports (S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6-7 (1974)):

> Due consideration should be given by the Board to preventing proliferation of bargaining units in the health care industry. In this connection, the Committee notes with approval the recent Board decisions in *Four Seasons Nursing Center*, 208 NLRB No. 50, 85 LRRM 1093 (1974), and *Woodland Park Hospital*, 205 NLRB No. 144, 84 LRRM 1075 (1973), as well as the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB No. 170, 83 LRRM 1242 (1973).*
>
> * By our reference to *Extendicare*, we do not necessarily approve all of the holdings of that decision.

That agreed-upon language in the legislative history has become known as the "congressional admonition." The admonition expressed Congress's intent not only that the Board give consideration to avoiding a proliferation of units that would burden hospitals and threaten patient care, but also "that the Board be free to exercise flexibility in dealing with unit determinations on a case-by-case basis." *St. Francis Hospital*, 271 NLRB 948, 951 n.17 (1984), remanded, *International Brotherhood of Electrical Workers* v. *NLRB*, 814 F. 2d 697 (D.C. Cir. 1987).

2. Following passage of the 1974 Act, the National Labor Relations Board determined the appropriateness of hospital bargaining units in its traditional way: through case-by-case adjudication. But as the court below found—and as the Board acknowledged in its first Notice of Proposed Rulemaking ("NPR I"), J.A. 5-9—the Board's efforts were "widely regarded as a failure" (Pet. App. 15a) and were regularly rejected by the courts of appeals, usually on the ground that the Board had failed to pay proper heed to the congressional admonition. It was against this

[3] The Administration took the position that neither the simple repeal of the hospital exemption nor Senator Taft's four-unit bill was appropriate. Instead, it urged Congress to extend NLRA coverage to hospitals under existing Board procedures but with "some additional safeguards" for the industry. *1973 Hearings* at 434, 436 (statement of Undersecretary of Labor Richard F. Schubert).

"dismal background" (*ibid.*) that the Board decided to abandon the flexible, case-by-case approach that had been applauded by the opponents of Senator Taft's first bill and to adopt its own rigid rule.

In *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765 (1975), the Board first considered a hospital bargaining unit in the light of the congressional admonition. The regional director of the Board had determined that a unit of all professionals—rather than the requested unit of registered nurses only—was appropriate. The full Board disagreed, however, and held "that registered nurses * * * are entitled to be represented for the purposes of collective bargaining in a separate bargaining unit." *Id.* at 767. But when the Board subsequently attempted to apply this *per se* rule that registered nurses were entitled to a separate unit, the Ninth Circuit denied enforcement. *NLRB* v. *St. Francis Hospital of Lynwood*, 601 F.2d 404 (9th Cir. 1979).

The Ninth Circuit carefully considered the legislative history of the 1974 Act, including the congressional admonition, and held that although a unit of registered nurses might be appropriate in some cases, the Board could not establish a presumption that such units are appropriate and thus dispense with the required case-by-case consideration (601 F.2d at 416):

> This is not to say that a determination of a bargaining unit composed exclusively of registered nurses can never be valid. Rather, the problem lies in a rule that such a unit is always valid and its concomitant procedural quirk which excludes any consideration of evidence to the contrary. What is necessary is a demonstration, not a mere presumption, of a disparity of interests between registered nurses and other hospital employees.

Several other courts of appeals also rejected bargaining unit determinations when the Board attempted to apply presumptions that certain bargaining units were appropriate or otherwise failed to consider in each case whether the proposed unit would cause "proliferation." See, *e.g.*, *Long Island Jewish-Hillside Medical Center* v. *NLRB*, 685 F.2d 29, 34-35 (2d Cir. 1982) (presumption that separate units should be recognized in each of an employer's facilities is inappropriate in the health care context in light of the congressional admonition); *NLRB* v. *Mercy Hospital Ass'n*, 606 F.2d 22, 27-28 (2d Cir. 1979), cert. denied, 445 U.S. 971 (1980) (maintenance unit rejected because Board failed to conduct "an independent evaluation" of whether it would contribute to proliferation "in this particular hospital"); *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 592-593 (3d Cir. 1977) (certification of separate unit of licensed boiler operators failed to heed the admonition); *NLRB* v. *Frederick Memorial Hospital, Inc.*, 691 F.2d 191, 194 (4th Cir. 1982) (separate unit of registered nurses requires specific explanation of how the unit comports with the admonition); *NLRB* v. *West Suburban Hospital*, 570 F.2d 213, 216 (7th Cir. 1978) (Board failed to show how "its unit determination in this case implemented or reflected th[e] admonition"); *NLRB* v. *HMO Int'l/California Medical Group Health Plan, Inc.*, 678 F.2d 806, 809-812 (9th Cir. 1982) (Kennedy, J.) (Board improperly certified separate unit of registered nurses without evaluating whether unit would lead to proliferation; Board has "ignored a controlling legal standard" and has "openly adopt[ed] a posture of noncompliance with the will of Congress"); *Beth Israel Hospital & Geriatric Center* v. *NLRB*, 688 F.2d 697, 698-699 (10th Cir. 1982), cert. dismissed, 459 U.S. 1025 (1982) (admonition precludes use of presumption that a bargaining unit is appropriate; Board must find in each case that the "units will not lead to undue proliferation at [the particular] health care facilities"); *Presbyterian/St. Lukes Medical Center* v. *NLRB*, 653 F.2d 450, 457 (10th Cir. 1981), cert. dismissed, 459

U.S. 1025 (1982) (reliance on presumption that a unit of registered nurses is appropriate violates the admonition).[4]

3. The Board's dismal record in the courts of appeals led it to revive its long-dormant rulemaking powers. Finding that "[t]hirteen years and many hundreds of cases later, the Board * * * [is] no closer to successfully defining appropriate bargaining units in the health care industry than it was in 1974" (NPR I, J.A. 9), the Board concluded that it could achieve greater "judicial and public acceptance" (*id.* at 14) of its approach to hospital bargaining units if it engaged in rulemaking to determine in advance what units were appropriate. The Board proceeded not merely to establish general guidelines, but to issue a rigid rule that eight designated bargaining units (and only those eight units) would be appropriate for every acute-care hospital, regardless of differences in size and operation. "We have decided not to make the units only 'presumptively' appropriate, because one important advantage of rulemaking is the certainty it offers." *Id.* at 21.

Although the original Notice of Proposed Rulemaking distinguished between large and small facilities and provided for only six bargaining units in large hospitals and four units in small hospitals (NPR I, J.A. 37-38), the

[4] In 1984, the Board reconsidered its approach to hospital bargaining units. In *St. Francis Hospital*, 271 NLRB at 953-954, it issued a new rule based on a "disparity of interests" standard that, in the words of the Board's Chairman, "as a practical matter allows for only four units—professionals, technicals, other nonprofessionals and guards." Stephens, "The NLRB's Health Care Rulemaking: Myths versus Reality," reprinted in N. Metzger, ed., *Handbook of Health Care Human Resources Management* 405, 409 (2d ed. 1990). However, the new rule was rejected by the District of Columbia Circuit, which held (against the weight of the circuits) that the Board erred in giving effect to the congressional admonition. *International Brotherhood of Electrical Workers* v. *NLRB*, 814 F.2d 697, 714-715 (D.C. Cir. 1987). That decision was "the straw that broke the camel's back and prompted us to undertake rulemaking." Stephens, *supra*, at 409. See also NPR I, J.A. 6-9.

Board's final rule eliminates the distinction based on size and increases the number of units to eight, providing that "[e]xcept in extraordinary circumstances," the following eight "shall be appropriate units, and the only appropriate units" for acute-care hospitals (Final Rule, J.A. 259-260):

(1) All registered nurses.
(2) All physicians.
(3) All professionals except for registered nurses and physicians.
(4) All technical employees.
(5) All skilled maintenance employees.
(6) All business office clerical employees.
(7) All guards.
(8) All [other] nonprofessional employees * * *.

The Board made it quite clear that the "extraordinary circumstances" exception was to be extremely narrow. The Board put hospital employers on notice that it would not consider additional evidence or arguments that a particular hospital varied from the norm even if the variation is "highly unusual." Second Notice of Proposed Rulemaking ("NPR II"), J.A. 187. "To satisfy the requirement of 'extraordinary circumstances,' a party would have to bear the 'heavy burden' to demonstrate * * * the existence of * * * unusual and unforeseen deviations from the range of circumstances revealed at the hearings and known to the Board from more than 13 years of adjudicating cases in this field." *Id.* at 189-190. The Board specified a long list of factors that it would not even consider as possible extraordinary circumstances.[5]

[5] NPR II, J.A. 188. The list includes: "(1) Diversity of the industry, such as the sizes of various institutions, the variety of services offered by individual institutions, including the range of outpatient services provided, and differing staffing patterns among facilities (as, for example, a particular facility employing a larger or smaller number of RNs than generally employed by similarly situated hospitals); (2) increased functional integration of, and a higher degree of work contacts between, employees as a result

(Footnote continued on following page)

4. Petitioner American Hospital Association filed suit challenging the rule in the United States District Court for the Northern District of Illinois. On July 25, 1989, the district court held that the rule was invalid and issued a permanent injunction barring its enforcement. Pet. App. 42a. The court "left for another day" (*id.* at 36a) the question of whether the Board's rule was precluded by the requirement of Section 9(b) that it determine the appropriate bargaining unit "in each case." 29 U.S.C. § 159(b). But it held that "[a] rule which designates an absolute number of appropriate units and mandates a particular division of the workforce * * * encourages, and perhaps coerces, fragmentation of the labor force" and therefore contravenes the congressional admonition. Pet. App. 41a-42a. The court thus found it unnecessary to reach AHA's claim that the rule was arbitrary, capricious, and not supported by substantial evidence.

The court of appeals reversed. Citing this Court's decision in *Heckler* v. *Campbell*, 461 U.S. 458, 467-468 (1983), the court of appeals held that the "in each case" requirement of Section 9(b) did not require case-by-case determination of bargaining units. The court also held that the rule was not precluded by the congressional admonition. Although it found that the admonition was entitled to "consideration," the court held that Congress was concerned with "finer divisions of the health-care work force than attempted in the rule under challenge." Pet. App. 14a.

The court of appeals also considered and rejected AHA's claim that the rule was arbitrary and capricious, particularly insofar as it failed to distinguish between "hospitals of different sizes and missions in different locations." Pet. App. 14a. Although the court found the hospital industry's argument that it was inappropriate for the Board to treat all hospitals alike to be "an important criticism," it chided the industry for failing to propose alternatives to the rule, not "respond[ing] constructively" to the Board's proposal of a six-employee minimum size for bargaining units, and "opposing a proposed distinction between hospitals having more than one hundred beds and hospitals having fewer." *Ibid.* Without discussing any of the evidence in the record—and even though the district court had not reached the issue and therefore had not reviewed the evidence—the court of appeals held that the rule was not arbitrary. *Id.* at 14a-16a.

On May 2, 1990, the court of appeals granted AHA's motion to stay the issuance of the mandate pending review by this Court. This Court granted the petition for a writ of certiorari on October 9, 1990.

[5] *continued*
of the advent of the multi-competent worker, increased use of 'team' care, and cross-training of employees; (3) the impact of nation-wide hospital 'chains'; (4) recent changes within traditional employee groupings and professions, e.g. the increase in specialization among RNs; (5) the effects of various governmental and private cost-containment measures; and (6) single institutions occupying more than one contiguous building."

SUMMARY OF ARGUMENT

I.

The Board's rule designating eight specific bargaining units as the only appropriate units for acute-care hospitals violates the requirement of Section 9(b) of the NLRA that the Board determine the appropriate bargaining unit "in each case." The "in each case" language was deliberately added to the Act to make it clear that Congress wanted the Board to engage in case-by-case determinations of bargaining units. It reflected the experience of the predecessor labor boards that the appropriate bargaining unit depended upon the facts of the particular case and that it would be unwise to attempt to establish rigid rules designating particular units as appropriate in every case. Therefore over the years, the Board and the courts have acknowledged the need for case-by-case unit determinations.

The Board's rule clearly violates the requirement of case-by-case determination of bargaining units. It precludes any meaningful consideration of the facts of a particular case. The Board has not merely established rules of general applicability to guide the unit determination process. Instead, it has established conclusive presumptions of law that apply even when the facts would warrant a different result.

None of the reasons given by the court of appeals for disregarding the "in each case" language can withstand analysis. The Board's rule in this case is not analogous to the Social Security Administration's rule upheld in *Heckler* v. *Campbell*, 461 U.S. 458 (1983). The statute involved in that case did not require determinations "in each case," and this Court made it clear that issues of fact unique to each case must be determined on a case-by-case basis. Section 9(b) cannot be explained as merely dealing with an old dispute between craft and industrial unionists. But even if it could, the "in each case" requirement was enacted into law and still stands, and cannot be ignored by the Board. The language of the statute and its legislative history do not deal solely with the allocation of responsibility to the Board to determine the appropriate unit, but instead make it clear that the Board must carry out its responsibility on a case-by-case basis.

II.

The health care bargaining unit rule is also contrary to the congressional admonition requiring the Board to take due care to avoid "proliferation of bargaining units in the health care industry." The admonition was included in both the Senate and House reports that accompanied the 1974 statute that extended the coverage of the NLRA to include the hospital industry. The admonition confirms that Section 9(b) requires individual, case-by-case determination of bargaining units.

The admonition is also of independent significance as evidence of the intent of Congress when it amended the entire NLRA to cover the health care industry. The legislative history—including the congressional admonition—demonstrates that Congress expected the Board to consider in each case whether approval of the unit requested would result in or lead to a proliferation of bargaining units.

III.

Insofar as it ignores the many critical differences among acute-care hospitals, the Board's rule is arbitrary, capricious, and not supported by substantial evidence. As the Board and its Regional Directors have found in numerous cases over the years, the diverse nature of the hospital industry precludes the application of any rigid rule that particular bargaining units are appropriate in every case. The Board's decision to treat all hospitals as if they were alike represents an abrupt reversal of positions and cannot stand without more thorough analysis than that provided by either the Board or the court of appeals.

ARGUMENT

THE NLRB'S HOSPITAL BARGAINING UNIT RULE IS INVALID BECAUSE IT CONFLICTS WITH THE LANGUAGE AND LEGISLATIVE HISTORY OF THE NLRA AND IGNORES CRITICAL DISTINCTIONS AMONG THE NATION'S 4,000 COVERED HOSPITALS

I. The Board's Rule Designating Eight Specific Bargaining Units As The Only Appropriate Units For Acute-Care Hospitals Is Contrary To The Requirement Of Section 9(b) That The Board Determine The Appropriate Unit "In Each Case."

Section 9(b) of the National Labor Relations Act, 29 U.S.C. § 159(b), requires the Board to determine an appropriate bargaining unit "in each case":

> The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

As Member Wilford W. Johansen observed in his dissent to the Board's rulemaking (J.A. 201), the bargaining-unit rule at issue here violates the plain meaning of Section 9(b) and represents a "radical departure from 50 years of Board precedent."

A. The Language And Legislative History Of Section 9(b) Demonstrate That Individual, Case-By-Case Determination Of Bargaining Unit Appropriateness Is Required

In its rulemaking proceedings, the Board attempted to characterize the "in each case" requirement of Section 9(b) as essentially meaningless, added to the Act as a "small amendment[ ] * * * for the sake of clarity." Final Rule, J.A. 212. We agree that the "in each case" language was added "for the sake of clarity"—to make it clear that Congress wanted the Board to engage in individual, case-by-case determinations of bargaining units and not to apply rigid, across-the-board categorizations.

1. In the original version of the National Labor Relations Act proposed by Senator Robert Wagner, Section 9(b) contained all of the present language *except* the words "in each case." Those words were added quite deliberately, by an amendment proposed by Secretary of Labor Frances Perkins, and were intended to carry their plain meaning. The House Report that accompanied the version of the bill that added the "in each case" language explained that the decision of whether a bargaining unit is appropriate "is obviously one for determination *in each individual case* * * *." H.R. Rep. No. 969, 74th Cong., 1st Sess. 20 (1935), reprinted in NLRB, *Legislative History of*

the National Labor Relations Act 1935 ("*1935 Leg. Hist.*") at 2930 (Reprint ed. 1985) (emphasis added). The same explanation of the language also appears in H.R. Rep. No. 972, 74th Cong., 1st Sess. 20 (1935), reprinted in *1935 Leg. Hist.* at 2976; and H.R. Rep. No. 1147, 74th Cong., 1st Sess. 22 (1935), reprinted in *1935 Leg. Hist.* at 3072.

In proposing the "small amendment" to make it clear that bargaining unit questions needed to be decided on an individual, case-by-case basis, the Secretary of Labor was well aware of the experience of the National Labor Board (1933-1934) and of the first National Labor Relations Board, created by Executive Order in 1934. Those Boards, operating under Section 7(a) of the National Industrial Recovery Act, established the principles of exclusive representation and majority rule. They struggled over bargaining unit questions and in the end concluded that no set rules were appropriate and that bargaining units should be determined based on the facts of each case.

As the first NLRB put it, "the question of what industrial unit should be recognized * * * is peculiarly an administrative matter which has been determined flexibly by the Board * * * without laying down too rigid general principles." *NLRB Six-Month Report to the President*, quoted in J. Gross, *The Making Of The National Labor Relations Board* 98 n.95 (1974). Francis Biddle, Chairman of the first NLRB, testified in support of the new law as follows:

> It is impossible, however, to lay down a definite rule for the determination of the appropriate unit, for such an attempt would result in rigidity and confusion. The whole system of industrial control and development depends on flexibility, and such considerations must be taken into account as the question of management and supervision, routine employment contracts, existing plans of collective bargaining, and the distinctiveness of the occupation.

1935 Leg. Hist. at 1459. See also *Houde Engineering Corp.*, 1 *Decisions Of The [First] National Labor Relations Board* 35, 44 (1934) ("This opinion lays down no rule as to what should constitute the proper unit as the basis of representation. * * * The question of the proper unit or units must be left for determination according to the circumstances of particular cases as they arise."); I. Bernstein, *The New Deal Collective Bargaining Policy* 86 (1950).

2. From the outset, the present National Labor Relations Board acknowledged that the Act required individual, case-by-case bargaining unit determinations. The Board's very first annual report explained that Congress required the Board to determine the appropriate unit individually in each particular case and precluded the adoption of rigid rules:

> Experience has proven the wisdom of delegating to the Board the task of deciding in each case the unit appropriate for purposes of collective bargaining. The complexity of modern industry, transportation, and communication, and the numerous and diverse forms which organization among employees has taken, preclude the application of rigid rules to determine the unit appropriate in each case.

NLRB, *First Annual Report* 112 (1936). Of course, this contemporaneous interpretation of the statute by the Board in its first year under the Act is entitled to great weight. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981); *Power Reactor Co.* v. *Electricians*, 367 U.S. 396, 408 (1961).

For over 50 years—until it issued the rule involved in this case—the Board carried out its statutory mandate and determined bargaining unit questions on an individual, case-by-case basis. The courts therefore had no occasion to remind the Board of its obligation to do so. Nevertheless, in a few cases beginning shortly after the Act was

passed, this Court noted that the statute required case-by-case determination of bargaining-unit appropriateness and precluded reliance on the kind of inflexible rules the Board has now issued. For example, in *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 134 (1944), the Court stated:

> Wide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit. Congress was informed of the need for flexibility in shaping the unit to the particular case and accordingly gave the Board wide discretion in the matter. * * * The flexibility which Congress thus permitted has characterized the Board's administration of the section and has led it to resort to a wide variety of factors in case-to-case determination of the appropriate unit.

See also *NLRB* v. *Action Automotive, Inc.*, 469 U.S. 490, 494 (1985) (noting "Congress' recognition 'of the need for flexibility in shaping the [bargaining] unit to the particular case"); *Packard Motor Car Co.* v. *NLRB*, 330 U.S. 485, 491 (1947) ("[t]he issue as to what unit is appropriate for bargaining is one for which no absolute rule of law is laid down by statute, and none should be by decision").[6]

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[6] The courts of appeals have rarely had occasion to address the meaning of the "in each case" requirement. But in those few cases where the language has been relevant, the courts of appeals have given effect to its plain meaning. For example, in holding that the Board could not accept a state agency's determination that a bargaining unit was appropriate, the Third Circuit emphasized that Section 9(b) required case-by-case determination by the Board:

> Congress has thus mandated Board determination "in each case" of "the unit appropriate" for collective bargaining. Thus the statute requires the Board to exercise its discretion as to an appropriate unit in each and every case.

Memorial Hospital of Roxborough v. *NLRB*, 545 F.2d 351, 360 (3d Cir. 1976). See also *NLRB* v. *Cardox Div. of Chemetron Corp.*, 699 F.2d 148, 155-156 (3d Cir. 1983); *Big Y Foods, Inc.* v. *NLRB*,

(Footnote continued on following page)

The Board deviated from its consistent observance of the "in each case" mandate briefly in the 1970s in cases involving the health care industry, but quickly reversed course and concluded that its deviation had violated Section 9(b). In a short-lived series of cases, the Board established and applied an irrebuttable presumption that in every hospital a separate unit of registered nurses was to be considered appropriate *per se* and that evidence to the contrary would not be admitted. *St. Francis Hospital of Lynwood*, 232 NLRB 32 (1977), enforcement denied, 601 F.2d 404 (9th Cir. 1979); *Methodist Hospital of Sacramento, Inc.*, 223 NLRB 1509 (1976); *Mercy Hospitals of Sacramento, Inc.*, 217 NLRB 765 (1975). After the courts of appeals rejected that approach, the Board admitted that it was contrary to the "in each case" requirement of Section 9(b):

> We have concluded that so much of the Board's [decisions] as may be read to establish an irrebuttable presumption of the appropriateness of registered nurse units in all cases, without regard to particular circumstances, should be disavowed. Such a *per se* approach to unit determination is inconsistent with the Board's Section 9(b) responsibility to decide "in each case" whether the requested unit is appropriate.

Newton-Wellesley Hospital, 250 NLRB 409, 411 (1980). See also *St. Francis Hospital*, 271 NLRB at 951 n.17 (acknowledging "Congress' intent that the Board be free to exercise flexibility in dealing with unit determinations on a case-by-case basis"). Thus the Board, just a few years before it started down the rulemaking path, admitted that such an approach would violate Section 9(b).

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[6] *continued*
651 F.2d 40, 45-46 (1st Cir. 1981); *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965, 968 (3d Cir. 1979); *Long Island College Hospital* v. *NLRB*, 566 F.2d 833, 840-841 (2d Cir. 1977), cert. denied, 435 U.S. 996 (1978).

B. The Board's Rule Violates The Requirement Of Individual, Case-By-Case Bargaining Unit Determination

The Board's rulemaking disregarded the language and history of the statute and reversed 50 years of precedent by maintaining that Section 9(b) does not require that bargaining units be determined on an individual, case-by-case basis. NPR I, J.A. 15; NPR II, J.A. 46-47; Final Rule, J.A. 211-218. As we demonstrate above, the Board's revisionist view of the statute is plainly incorrect. But that was not the Board's only defense of its rule. The Board also made the incongruous assertion that its rule *fulfilled* the requirement of case-by-case determination:

> There is nothing inconsistent between section 9(b) and the Board's use of its APA rulemaking power. Section 9(b) requires the Board to decide the appropriate unit in each case, and the Board will continue to do so under this rule. Should the parties not agree on the appropriate unit, a hearing in each case will still be directed, with the Board ultimately rendering a decision on the appropriate unit applicable to that particular petition and that particular employer's operation.

Final Rule, J.A. 214. The Board characterized its rule as establishing principles "of general applicability" that would be applied on a case-by-case basis. *Ibid.*

We agree that the Board could adopt rules establishing general principles to guide the required case-by-case bargaining unit determinations. For example, the Board could issue regulations stating the factors regional directors should weigh in determining bargaining unit appropriateness. But the rule at issue in this case does not merely establish general principles to guide case-by-case determinations. By its express terms, the rule is intended to preclude any individual case-by-case evaluation by ordering that the eight designated bargaining units "shall be appropriate units, and *the only* appropriate units" for acute-

care hospitals "[e]xcept in extraordinary circumstances." Final Rule, J.A. 259 (emphasis added).

The Board has made it quite clear that it views the "extraordinary circumstances" exception as so narrow as to be illusory. The Board warned that "[t]o satisfy the requirement of 'extraordinary circumstances,' " a party would have to bear the 'heavy burden' to demonstrate * * * unusual and unforeseen deviations from the range of circumstances revealed at the hearings and known to the Board from more than 13 years of adjudicating cases in this field * * *." NPR II, J.A. 189-190. The Board expressly rejected the notion that it was simply establishing presumptions that those eight units were appropriate. Final Rule, J.A. 217; NPR I, J.A. 21. Moreover, the Board issued a long list of factors that it would not even consider as potential extraordinary circumstances. See note 5, *supra*. By refusing to even consider such things as the organizational structure of the hospital and the duties and working conditions of the employees involved, the Board completely disregards the very factors it considers most relevant to bargaining unit determinations in all other industries.[7]

In these circumstances, there can be no question that the Board's rule violates Section 9(b)'s requirement of meaningful, case-by-case bargaining unit determination. The Board's promise that each case would receive an individual hearing is an empty one. In the hearings it would hold under the rule, the Board would not even allow the introduction of evidence relating to the factors that the Board itself regards as crucial to bargaining-unit determinations in *all* other industries. Instead, the Board simply would verify whether the bargaining unit in question is one of the eight listed in the rule, and on that basis alone automatically declare the unit appropriate. The Board has established not merely a principle of general applicability, or even a rebuttable presumption of fact; instead, it has established a presumption of law that applies even when the facts are to the contrary. Thus the rule defies the Act's requirement of meaningful, case-by-case consideration.

[7] In every other industry, the "similarity of duties, skills, interests, and working conditions of the employees" and the "organizational structure of the company" are among the most important factors to be considered in determining bargaining unit appropriateness. C. Morris, *The Developing Labor Law* 414 (2d ed. 1983). See also *Birdsall, Inc.*, 268 NLRB 186, 190-192 (1983); R. Gorman, *Basic Text On Labor Law* 69 (1976).

C. The Reasons Given By The Court of Appeals For Disregarding The "In Each Case" Requirement Cannot Withstand Analysis

Even though the language of the statute and its legislative history, as well as the manner in which the statute has been interpreted and applied over the years by the courts and the Board, demonstrate that Section 9(b) requires individual, case-by-case determinations of bargaining unit issues, the court of appeals held to the contrary. The court gave three reasons for its conclusion, but none of them can withstand analysis.

1. First, the court of appeals held that "such interpretations are regularly rejected in decisions involving challenges to agency rules, such as the Social Security Administration's 'grid' method of deciding entitlement to disability benefits. *Heckler* v. *Campbell*, 461 U.S. 458, 467-68 (1983)." Pet. App. 6a. But the statute involved in *Campbell* did not include any language analogous to the "in each case" requirement of Section 9(b). Moreover, this Court upheld the rule involved in *Campbell* because it involved "an issue that is not unique to each claimant." 461 U.S. at 468. The Court merely held that an "agency may rely on its rulemaking authority to determine issues that *do not require case-by-case consideration.*" *Id.* at 467 (emphasis added). By contrast, bargaining unit determinations *do* involve issues that are unique to each employer.

By their nature—and by the language of the statute—they *do* require case-by-case consideration.[8]

A closer look at the *Campbell* decision and the rules at issue in that case actually supports AHA's position that the Board's bargaining-unit rule is invalid. The Social Security Act requires the Secretary of Health and Human Services to make a two-part determination. As the Court explained (461 U.S. at 467-468):

> [The Secretary] must assess each claimant's individual abilities and then determine whether jobs exist that a person having the claimant's qualifications could perform. The first inquiry involves a determination of historic facts, and the regulations properly require the Secretary to make these findings on the basis of evidence adduced at a hearing. We note that the regulations afford claimants ample opportunity both to present evidence relating to their own abilities and to offer evidence that the guidelines do not apply to them. The second inquiry requires the Secretary to determine an issue that is not unique to each claimant—the types and numbers of jobs that exist in the national economy.

The issues that the Board's rule conclusively determines are like the issues involved in the *first* part of the disability determination: they are matters of historic fact, unique to each hospital. The question of whether a particular bargaining unit is appropriate to a particular hospital (and the question of whether the unit would cause proliferation) involves such issues as the size, location, staffing patterns and operation of the hospital, the degree of functional integration of the workforce, and so on—all unique factual matters that the Board will no longer consider even as possible extraordinary circumstances. NPR II, J.A. 188. It is simply nonsense to regard these issues as analogous to the national availability of jobs issue that the Court held could be determined by rulemaking.

[8] In upholding the regulations in *Campbell*, the Court relied on its previous decisions in *Federal Power Comm'n* v. *Texaco, Inc.*, 377 U.S. 33, 40 (1964), and *United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956). The Court was careful to emphasize that in those cases—as in *Campbell*—"an individual applicant [was allowed] to show that the rule promulgated should not be applied to him." 461 U.S. at 467 n.11. In this case, however, the Board has foreclosed that possibility by making it clear that the rule applies in *all* cases, except in the rare instance where there are "extraordinary circumstances" warranting a different result.

2. The court of appeals also reasoned that the "in each case" language was intended to prevent the Board from siding with either "of the two major labor federations, the AFL and the CIO—the former a federation of craft unions, the latter of plant unions." Pet. App. 7a. The court stated that "[i]f the Board had ruled that all bargaining units should be craft units or that all should be plant units, it would have altered the balance of power between the federations dramatically. The 'in each case' proviso forbids the Board to do this." *Ibid.*

But the "in each case" language and the entire Act predates the dispute between the AFL and the CIO. The language was added to the Wagner bill in May 1935, and the NLRA was passed the next month. The CIO was formed initially as a committee within the AFL after the AFL convention in October 1935, and did not break away as a separate federation until 1938. As a leading historian of the Act has commented, "[n]one of the draftsmen [of the Wagner Act] foresaw the cleavage in the union movement that appeared later in 1935." I. Bernstein, *The New Deal Collective Bargaining Policy* 96 (1950).[9]

[9] See also I. Bernstein, *The Turbulent Years* 400-402, 697-698 (1970); W. Galenson, *The CIO Challenge To The AFL* 3 (1960) ("November 9, 1935 [is] the date usually given as the birthday of the CIO").

At the time the Act was passed there were unions within the AFL that supported industrial unionism rather than the traditional craft approach. Section 9(b) recognizes the difference in view between craft and industrial unions (and declines to decide which view is correct) by providing that the appropriate unit "shall be the employer unit, craft unit, plant unit or subdivision thereof." If the requirement that "[t]he Board shall decide [the appropriate unit] in each case" is at all related to the disagreement between craft and industrial unionists, it is to the extent that Congress did not want the Board to issue any blanket declarations that either craft or industrial units would always be deemed appropriate. Instead, Congress wanted the Board to decide the appropriate unit "in each case."

In any event, whatever purpose Congress had in mind when it added the "in each case" requirement, the fact remains that Congress added those words to Section 9(b) and that the Board has improperly disregarded them. Moreover, it is hard to see how a rule that designates certain craft units (e.g., registered nurses, physicians, business office clerical employees) as appropriate in every case and that absolutely precludes organization on an across-the-board, industrial basis can be regarded as consistent with the supposed intent of Congress to prevent the Board from siding with either the craft or the industrial unionists.

3. The court of appeals' third reason for holding that the "in each case" language did not preclude establishing bargaining units by rule was that it construed the legislative history (including the statement in several of the House Reports that the appropriateness of a bargaining unit "is obviously [a matter] for determination in each individual case") to mean only "that unit determination is a task meet for the Board rather than for either the Congress or the employees themselves." Pet. App. 7a-8a. In addition, the court concluded that if Congress had meant the "in each case" language to preclude the kind of rule-

making the Board has undertaken, "it is probable (no stronger statement is possible) that Congress would have made an explicit exception for unit determination" in Section 6 of the Act, which gives the Board rulemaking authority. *Id.* at 8a. Both assertions are incorrect.

To begin with, although other passages in the House Reports' discussion of Section 9(b) indicate that unit determination is a matter for the Board to decide, the statement that the question of whether a bargaining unit is appropriate "is obviously one for determination in each individual case" clearly relates to how bargaining units should be determined, and not to who should make that determination. That statement explains the "in each case" language, not the allocation of responsibility for the determination to the Board.

Nor is it even "probable" that Congress would have amended Section 6 to make it clear that bargaining unit determinations could not be performed by rulemaking. Congress *did* include an "explicit exception for unit determination"; that exception is the "in each case" language of the subsequent Section 9(b). It simply would have been redundant to repeat the specific exception of Section 9(b) within the more general rule of Section 6. Moreover, it requires a perversion of the normal tenets of statutory construction to argue that the general language of Section 6 overrides the specific language of Section 9(b).[10]

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[10] In *Heckler* v. *Campbell* this Court noted that the determination of a disability claimant's abilities required an individual, case-by-case determination. 461 U.S. at 467-468. Yet the Social Security Act gives the Secretary broad rulemaking powers and does not specifically state that those powers do not apply to the Secretary's determination of an individual claimant's abilities. See 42 U.S.C. § 405(a).

II. The Board's Rule Is Contrary To The Congressional Admonition Requiring The Board To Take Special Care To Avoid Proliferation Of Bargaining Units In The Health Care Industry

The Board's rule not only is contrary to the express language of Section 9(b), but it also is plainly inconsistent with the Health Care Amendments Act of 1974 and with the admonition contained in both the House and Senate Reports requiring the Board to give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry." Pet. App. 8a. The congressional admonition is relevant in two respects. First, it stands as a reaffirmation of the requirement of case-by-case bargaining unit determination. Second, as an expression of the intent of Congress when it extended the National Labor Relations Act to cover nonproprietary hospitals, the admonition is an authoritative statement of the meaning of the Act as applied to that industry. And, as numerous courts of appeals have held, the admonition requires that the Board consider *in each case* whether the requested bargaining unit will result in or lead to an undue proliferation of units at the particular hospital. The Board's rule would dispense with that requirement.

A. The Congressional Admonition And The Legislative History Of The 1974 Amendments Confirm That Section 9(b) Requires Individual, Case-By-Case Determinations Of Bargaining Units

As we pointed out earlier (3-5, *supra*), the Health Care Amendments Act of 1974 was the product of a two-year legislative process. In 1972, the House of Representatives passed a bill that simply would have repealed the exemption of hospitals from the coverage of the National Labor Relations Act. *1974 Leg. Hist.* at 10. That bill was opposed in the Senate by Senator Robert Taft, Jr., among others, and never was voted out of committee.

The following year, Senator Taft sponsored a new bill (S. 2292) that would also have extended the Act's coverage to include hospitals. *1974 Leg. Hist.* at 106. But in addition it would have designated four units as the only appropriate bargaining units in all hospitals: professionals, technicians, office clericals, and other nonprofessionals. *Id.* at 457-458. That bill was opposed as overly rigid and unduly restrictive of the Board's flexibility to determine bargaining units on a case-by-case basis taking into account the particular situation at each hospital. *Id.* at 113-114. During the hearings on Senator Taft's bill, the Department of Labor took the position that "with regard to unit determinations * * * the existing procedures, particularly as they have worked in the for-profit hospitals, and the other health care fields, are sufficient to meet the need." *1973 Hearings* at 434. Those existing procedures, of course, included case-by-case bargaining unit determinations.[11]

In light of those objections, Senator Taft withdrew his bill before it ever came to a vote in committee.[12] Senator

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[11] The Labor Department spokesman gave as an example of the success of the existing procedures the Board's ruling in the *Extendicare* case, where, in light of the particular facts involved, the Board *rejected* separate units of technical employees and service and maintenance employees on the ground that separate units "would create unwarranted unit fragmentation." *1973 Hearings* at 427. The Board's rule would allow those separate units.

[12] In these circumstances, it would be inappropriate to construe the fact that S. 2292 was never enacted—and never even voted upon—as demonstrating that Congress believed four units were too few. As the Board concluded before it decided to engage in rulemaking, "[t]he mere fact that the Taft proposal was not included in the enacted legislation may not properly be attributed to its being perceived as numerically too restrictive." *St. Francis Hospital*, 271 NLRB 948, 951 n.17 (1984). As a general matter, congressional inaction "affords the most dubious foundation for drawing positive inferences." *United States* v. *Price*, 361 U.S. 304, 310-311 (1960). See also *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 110 S. Ct. 2668, 2678 (1990); *United States* v. *W.M. Webb*,

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Taft—through his staff—then entered into "protracted discussions" with all of the parties concerned, obtained agreement in principle, and introduced a compromise bill that became the Health Care Amendments Act of 1974. *1974 Leg. Hist.* at 111. Because of the objections to S. 2292, the Act did not limit the Board's flexibility to determine the appropriate unit on a case-by-case basis. Instead, it was accompanied by agreed-upon language in both the Senate and House Reports requiring that the Board, in carrying out its required case-by-case determinations, give "[d]ue consideration * * * to preventing proliferation of bargaining units in the health care industry." S. Rep. No. 766, 93d Cong., 2d Sess. 5 (1974); H.R. Rep. No. 1051, 93d Cong., 2d Sess. 6 (1974).

Senator Taft explained the legislative process and the meaning of the admonition as follows:

> The issue of proliferation of bargaining units in health care institutions has also greatly concerned me during consideration of legislation in this area. Hospitals and other types of health care institutions are particularly vulnerable to a multiplicity of bargaining units due to the diversified nature of the medical services provided patients. If each professional interest and job classification is permitted to form a separate bargaining unit, numerous administrative and labor relations problems become involved in the delivery of health care. The provisions of S. 2292 placed a statutory limit of four bargaining units in a health care institution. While this precise approach was not adopted by the committee, report language was agreed upon to stress the necessity to the Board to reduce and limit the number of bargaining units in a health care institution.
>
> * * *
>
> I believe this is a sound approach and a constructive compromise, as the Board should be permitted some flexibility in unit determination cases. I cannot stress enough, however, the importance of great caution being exercised by the Board in reviewing unit cases in this area. Unwarranted unit fragmentation leading to jurisdictional disputes and work stoppages must be prevented.

1974 Leg. Hist. 113-114.[13]

The congressional admonition was thus part of a compromise under which the Board retained its authority to determine the appropriate unit in each case rather than have that discretion limited by the designation in the statute of particular units as appropriate. Although the

[12] *continued*
Inc., 397 U.S. 179, 194 n.21 (1970). It is entirely possible that some in Congress may have opposed S. 2292 because they opposed any repeal of the hospital exemption, others because they believed that all nonprofessionals should be in a single unit, and yet others because it did not contain some of the other protections eventually incorporated into the 1974 Act.

[13] Senator Harrison A. Williams, Chairman of the Senate Labor Committee and a co-sponsor of the bill, argued that the Board should give due consideration to avoiding proliferation, and emphasized that such consideration should occur within the framework the Board had always used to determine appropriate bargaining units (i.e., individual, case-by-case determinations):

> [T]he National Labor Relations Board has shown good judgment in establishing appropriate units for the purposes of collective bargaining, particularly in wrestling with units in newly covered industries. While the Board has, as a rule, tended to avoid an unnecessary proliferation of collective bargaining units, sometimes circumstances require that there be a number of bargaining units among nonsupervisory employees, particularly where there is such a history in the area or a notable disparity of interests between employees in different job classifications.
>
> While the committee clearly intends that the Board give due consideration to its admonition to avoid an undue proliferation of units in the health care industry, it did not within this framework intend to preclude the Board acting in the public interest from exercising its specialized experience and expert knowledge in determining appropriate bargain[ing] units. (*NLRB* v. *Delaware-New Jersey Ferry Co.*, 128 F.2d 130 (3d Cir. 1942)).

1974 Leg. Hist. 362-363.

Board's flexibility was retained, it was made subject to the requirement that in addition to considering all of the other case-specific factors involved in bargaining-unit determinations, the Board take special care to consider whether approval of the unit in question would result in or lead to proliferation of bargaining units at that hospital. The congressional admonition in this manner reaffirmed the need for case-by-case unit determinations and underscored Section 9(b)'s requirement that the Board determine the appropriate unit "in each case." By designating certain specific units as the only appropriate units in the industry—and by thus doing exactly what Congress decided *not* to do—the Board has clearly violated the statute.

B. The Board's Rule Is Contrary To The Intent Of Congress As Expressed In The Congressional Admonition

In addition to confirming Congress's understanding that Section 9(b) requires case-by-case determinations of appropriate bargaining units, the congressional admonition is an authoritative statement of what Congress intended when it extended the Act's coverage to include nonproprietary hospitals. As numerous courts of appeals have held, the admonition requires the Board to determine—in each case--whether approval of the bargaining unit at issue will result in or lead to proliferation. It is ironic indeed that under the Board's rule, the *only* industry as to which the Board does not provide meaningful, case-by-case determination of bargaining unit appropriateness is the one industry as to which Congress specifically admonished the Board to take special care. Instead of giving due consideration to preventing bargaining-unit proliferation in the health care industry, the Board's rule discards its traditional, case-by-case approach and takes no particularized care at all.

1. In its rulemaking, the Board offered three responses to the claim that it had ignored the congressional admonition. First, the Board argued that the eight bargaining units required by the rule do not present the kind of proliferation problem that concerned Congress. "Congressional and industry concern with proliferation was directed towards the fifteen to twenty plus units that had arisen in the health care and other industries prior to the amendments and the possibility of scores of units if each hospital classification were permitted to organize separately." NPR II, J.A. 191. See also Final Rule, J.A. 246-254.

There are two flaws in the Board's reasoning. To begin with, it trivializes the proliferation problem that concerned Congress by characterizing it simply as a matter of numbers. The legislative history—including the rejection of the 1972 bill that merely would have repealed the exemption of nonproprietary hospitals without further comment, the opposition to Senator Taft's bill that would have designated four appropriate units, and the passage of the final bill with the admonition against proliferation in both the Senate and the House reports—demonstrates that Congress was acutely concerned with proliferation, but rejected any approach that would have specified any particular type or number of units as appropriate. Instead, it directed the Board to continue to exercise flexibility in determining hospital bargaining units on a case-by-case basis, and in doing so to give "due consideration" to avoiding any proliferation of bargaining units.

Congress's approach acknowledges the fact that hospitals vary greatly one from another, and as a result have different bargaining histories, different numbers of existing bargaining units, and different sizes and organizational structures. At some hospitals, approval of a new unit of skilled maintenance employees may not result in proliferation,[14]

[14] For example, that unit might be the first in the hospital to organize and other units might be unlikely. Of course, the Board also should consider whether approval of that unit is likely to lead to proliferation of units in the future.

but in other hospitals it might.[15] Only by heeding the congressional admonition and considering the proliferation issue in each case (as it is required to do by Section 9(b)) can the Board determine the impact of an additional bargaining unit on a particular hospital. No magic number of units is automatically excessive or always appropriate. And no particular unit or number of units is certain in every case not to cause the problems that concerned Congress.

Accordingly, nearly all of the courts of appeals have held *not* that a particular unit or number of units is excessive *per se*, but instead that the Board must consider the proliferation issue in each case. As the Ninth Circuit put it:

> "[D]ue consideration" demands individual examination by the Board, or its delegate, of the circumstances of each particular case in order to determine the propriety of the proposed unit in light of the congressional directive and the public interest.

NLRB v. *St. Francis Hospital of Lynwood*, 601 F.2d 404, 416 (9th Cir. 1979). See also *NLRB* v. *HMO International/California Medical Group Health Plan, Inc.*, 678 F.2d 806, 812 (9th Cir. 1982) (Kennedy, J.) ("Our holding should not be taken to imply that a separate unit for RNs is necessarily suspect; we simply are in no position to review compliance with the statute absent a legal and factual analysis by the NLRB of the nonproliferation issue"). Most of the other circuits have reached the same conclusion. See, e.g., *NLRB* v. *Mercy Hospital Ass'n*, 606 F.2d 22, 27 (2d Cir. 1979), cert. denied, 445 U.S. 971 (1980); *Allegheny General Hospital* v. *NLRB*, 608 F.2d 965, 970-971 (3d Cir. 1979); *NLRB* v. *Frederick Memorial Hospital, Inc.*, 691 F.2d 191, 194 (4th Cir. 1982); *Bay Medical Center* v. *NLRB*, 588 F.2d 1174, 1176-1177 (6th Cir. 1978), cert. denied, 444 U.S. 827 (1979); *Mary Thompson Hospital, Inc.* v. *NLRB*, 621 F.2d 858, 863 (7th Cir. 1980); *Watonwan Memorial Hospital, Inc.* v. *NLRB*, 711 F.2d 848, 850 (8th Cir. 1983); *Beth Israel Hospital & Geriatric Center* v. *NLRB*, 688 F.2d 697, 700 (10th Cir.), cert. dismissed, 459 U.S. 1025 (1982); *NLRB* v. *Walker County Medical Center, Inc.*, 722 F.2d 1535, 1539 (11th Cir. 1984).[16]

[15] For example, the bargaining history of the hospital might already show a tendency toward frequent work stoppages and the new unit may create the likelihood of jurisdictional disputes with existing units. Consideration of the size of the particular hospital, its organizational structure, and the interaction among employees also may show that the proposed unit would create or lead to undue proliferation or would otherwise be inappropriate.

By designating the eight bargaining units as appropriate in every case, the Board has completely eliminated any opportunity for consideration of whether approval of one of those units in a particular instance would lead to the problems that concerned Congress. The Board supported its rule by observing that all eight units will not be present in every case. Final Rule, J.A. 250-251; NPR II, J.A. 193. That might be true, but even in those hospitals where all eight units *are* present, the Board's rule would preclude individual consideration of the effect of those units on the hospitals.[17] The rule thus is contrary to the intent of Congress—and to the meaning of Section 9 as applied to this industry—that the Board give due consideration to avoiding proliferation of bargaining units in each case.[18]

[16] The First and Fifth Circuits have not considered the issue. The sole exception is the District of Columbia Circuit, which reached the contrary conclusion in *International Brotherhood of Electrical Workers* v. *NLRB*, 814 F.2d 697, 704-705 (D.C. Cir. 1987).

[17] It even appears that the Board will not even consider the proliferation issue in cases where its rule would lead to *more than eight units*. In situations where there are already units in existence that do not conform to the Board's rule (and which may number more than eight), the Board will nevertheless approve *additional* units without considering the proliferation issue if they "comport, insofar as practicable, with the appropriate unit set forth in [the rule]." Final Rule, § 103.30(c), J.A. 260.

[18] In arguing that Congress was concerned only with the possibility of "scores of units," the Board has attempted to characterize

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The Board's argument that Congress was concerned only about "the possibility of scores of units" is flawed in yet another respect. It certainly is true that in opposing the bill, hospital industry representatives cited some extreme examples of proliferation, both in their industry and in others (*i.e.*, the construction and newspaper industries). But that hardly means that their concerns were limited to avoiding those extremes. As the Second Circuit put it, "Congress was expressing concern not only that health care institutions be spared the egregious unit proliferation of the construction trades but that less extreme unit fragmentation arising from application of usual industrial unit criteria could also impede effective delivery of health care services." *NLRB* v. *Mercy Hospital Ass'n*, 606 F.2d at 27. As one Board member noted, it would be a "remarkable construction of the legislative history" to take out of context the citation of one "particularly undesirable example of unit proliferation" and characterize it as defining the whole of congressional concerns. *Allegheny General Hospital*, 239 NLRB 872, 883 (1978) (Member Penello

[18] *continued*
the 1974 Act and the congressional admonition as a compromise between those who wanted simply to repeal the exemption of the hospital industry from the coverage of the Act and those who supported Senator Taft's earlier bill (S. 2292) repealing the exemption but allowing only four bargaining units. See [Court of Appeals] Brief for the National Labor Relations Board at 34-39. That is misleading. Although some industry groups endorsed the earlier Taft bill as a necessary compromise, much of the industry opposed altogether any repeal of the exemption. See *1974 Leg. Hist.* at 46: ("S. 3203 represents a compromise between those parties favoring a simple repeal of the existing exemptions from Taft-Hartley coverage for nonprofit hospitals and some of those resisting such a repeal") (statement of Sen. Dominick). The congressional admonition cannot be regarded as a compromise between those who favored four units and those who favored "scores of units." Instead, it was a compromise between those who favored repeal of the hospital exemption and those who opposed repeal. The nature of the compromise was to require the Board carefully to consider the proliferation issue as it considered other issues in the required case-by-case assessment of bargaining unit appropriateness.

dissenting), enforcement denied, 608 F.2d 965 (3d Cir. 1979).[19]

One can search in vain through the House and Senate Reports and the comments of members during the debates to find any statement that Congress's concern was limited to the possibility of "fifteen to twenty plus units" or "scores of units" and that Congress would be satisfied with any number less than 15. To the contrary, the congressional reports expressed approval of cases taking a far more restrictive approach. In the admonition, Congress "note[d] with approval" the Board's decision in *Four Seasons Nursing Center*, 208 NLRB 403 (1974), and *Woodland Park Hospital*, 205 NLRB 888 (1973).[20] In *Four Seasons*, the Board *rejected* a separate unit of skilled maintenance workers, one of the units the Board's rule would establish. The Board indicated that the maintenance workers should be included in the same unit with other nonprofessional employees.

[19] In denying enforcement of the Board's order, the Third Circuit cited Member Penello's dissenting opinion with approval. 608 F.2d at 968-969.

[20] Congress also noted with approval "the trend toward broader units enunciated in *Extendicare of West Virginia*, 203 NLRB 1232 (1973)," although it indicated in a footnote that "we do not necessarily approve all of the holdings" of *Extendicare*. *1974 Leg. Hist.* at 12, 275. In that case, the Board *rejected* separate units of technical employees and service and maintenance employees, noting that "a finding that two separate units are appropriate would create unwarranted unit fragmentation." 203 NLRB at 1233. (Of course, those units would be approved under the Board's rule.) But the Board permitted a separate unit of licensed practical nurses, and doubts about the propriety of separating that unit led Congress to include the footnote indicating that it did not necessarily approve of the entire decision. See *1974 Leg. Hist.* at 255; *St. Vincent's Hospital* v. *NLRB*, 567 F.2d 588, 591 n.5 (3d Cir. 1977); C. Morris, *The Developing Labor Law* 437-438. The admonition's reference to *Extendicare* thus clearly shows a preference for broader units than those now designated as appropriate by the Board.

In *Woodland Park Hospital*, the Board's Regional Director originally set a broad bargaining unit of nonprofessional employees, but then decided to allow x-ray technicians to form a separate unit. The Board *rejected* that separate unit and ordered that the x-ray technicians be included in a broad nonprofessional unit—a single unit that would encompass *four* of the eight units the Board's rule would regard as separately appropriate.[21] Thus, in both of these cases the Board favored units far broader than the eight the Board now seeks to designate as appropriate in every case. And Congress expressly approved that approach.

2. In addition to claiming that Congress was concerned only with the possibility of 15 or 20 bargaining units, the Board asserted in its rulemaking that it could properly ignore the congressional admonition because it was of no binding effect. Final Rule, J.A. 247-248. The Board argued that because "section 9(a) was not changed in 1974," the congressional admonition is a nullity. *Ibid.*

That argument ignores the fact that insofar as the hospital industry is concerned, the *entire* statute was amended in 1974. As the court of appeals held:

> The admonition * * * accompanied the enactment of substantial amendments. The particular statutory provision to which the admonition was addressed was not amended, but the effect of the amendments was to apply that provision for the first time to the nonproprietary hospital industry. Section 9(b) directs the Board to determine the "appropriate" unit, and what is appropriate may differ from one industry to another—may therefore "mean" something different in one industry from what it means in another. So in

[21] The broad unit designated by the Board in *Woodland Park Hospital* included the technical employees, skilled maintenance employees, business office clerical employees, and other nonprofessional employees units designated as appropriate by the Board's rule.

> changing the domain of application of section 9(b), the 1974 amendments may have changed its meaning without changing its words. The admonition can therefore be regarded as a commentary on the meaning of the 1974 amendments and hence as equivalent to pre-enactment legislative history, rather than as a gratuitous comment unrelated to legislative action—the case in *Pierce* v. *Underwood*, 108 S. Ct. 2541, 2551 (1988), and *Center for Auto Safety* v. *Peck*, 751 F.2d 1336, 1351 (D.C. Cir. 1985).

Pet. App. 11a-12a.

We certainly agree that "legislative history" unrelated to the enactment of legislation is of no impact. But that is not the case with the congressional admonition. Because the entire statute was amended in 1974 insofar as the health-care industry is concerned, the legislative history of the 1974 amendments is an authoritative indication of what Congress intended when it expanded the Act's coverage. That particularly is true where, as here, the legislative history is entirely consistent with the original act and requires the Board to continue to do what the original act required: consider bargaining unit issues on an individual, case-by-case basis taking into account the circumstances of the particular industry and employer (including whether the requested unit would result in or lead to a proliferation of bargaining units).

3. The Board offered yet a third reason why the congressional admonition against proliferation of bargaining units should not be permitted to stand in the way of its rulemaking. The Board argued that the admonition should be ignored because Congress based it on incorrect premises:

> The legislative history showed "proliferation" was opposed by Congress because it was feared that [it] would lead to numerous work stoppages, jurisdictional disputes, and wage whipsawing and leapfrogging. However, as was amply documented in NPR II, multiple units have not been shown to cause an unusual num-

> ber of work stoppages, nor have they been shown to have caused jurisdictional disputes, wage whipsawing, or leapfrogging.
>
> * * *
>
> [T]he evidence presented to us is that there were virtually none of the disruptive consequences which concerned Congress during the 1974 debates.

Final Rule, J.A. 251-252.

There are two critical defects in the Board's argument. First, the Board's "finding" that multiple units have not caused the problems Congress anticipated ignores the fact that there has *not* been a proliferation of bargaining units in the industry since 1974 because the courts have rejected the Board's approach. Had there been a proliferation of units, the Board then might have been able to examine its impact. But since the courts have prevented any proliferation from occurring, the Board's "finding" that proliferation has not caused problems is sheer speculation based on little or no evidence.

Moreover, and more important, it is not for the Board to redetermine legislative facts already determined by Congress. As the Board acknowledges, Congress reviewed the evidence (including extensive testimony from both union and industry representatives) and found that proliferation of bargaining units *would* cause work stoppages, jurisdictional disputes, whipsawing and leapfrogging. J.A. 251. If the Board believes that Congress's findings have been proven wrong, the appropriate course is to ask Congress to reconsider the issue, not to violate the agency's statutory mandate.

III. The Board's Rule Is Arbitrary And Capricious And Not Supported By Substantial Evidence Insofar As It Ignores Critical Differences Among Hospitals

As we demonstrate above, the language and legislative history of Section 9(b) and of the 1974 amendments do

not permit the Board to establish by rule that certain bargaining units—and only those units—are appropriate for all acute-care hospitals. But even if the statute authorized the Board to adopt such a rule as a general matter, the rule at issue in this case would still be invalid. The rule is arbitrary, capricious, and not supported by substantial evidence insofar as it ignores critical differences among the more than 4,000 acute-care hospitals in the United States, including differences in size, location, operations, and workforce organization. Although the district court found it unnecessary to reach this issue (Pet. App. 41a n.17), the court of appeals—without any detailed examination of the evidence in the record—held that the rule was not arbitrary. Pet. App. 14a-16a.

The court of appeals characterized AHA's argument that the rule improperly lumped together hospitals of greatly differing size, missions, and locations as "an important criticism" (Pet. App. 14a) and agreed that the Board's rigid rule "overlook[s] a great deal of relevant diversity." *Id.* at 15a. Indeed, until this rulemaking procedure, the Board itself had concluded that a case-by-case approach to bargaining units was necessary in light of the diversity of the industry. *St. Francis Hospital*, 271 NLRB at 953 n.39.

Nevertheless, the court of appeals upheld the Board's rule treating all acute-care hospitals alike without conducting any real examination of the record evidence. The court based its result in large part on its view that the hospital industry had failed to propose adequate alternatives or to seek modification of the Board's rule (Pet. App. 14a):

> [The industry's] important criticism * * * would impress us more if the industry had proposed an alternative that recognized the diversity of the industry but preserved the virtues of a rule. * * * Another way in which the industry failed to respond construc-

> tively to the Board's desire to bring unit determination in the acute-care hospital industry under a rule was by failing to press for an increase in the six-employee minimum [for employees in a unit].[22]

The relevant issue, however, is not whether the hospitals offered and supported a reasonable alternative, but whether the Board's rule was "arbitrary," "capricious," or "unsupported by substantial evidence." 5 U.S.C. § 706(2)(A), (E). The court of appeals failed seriously to examine that issue. Instead, the court simply asserted that in view of the Board's "dismal" record in justifying its hospital-unit determinations to the courts of appeals, "it was not unreasonable for the Board to experiment with substituting a tight rule for a loose standard." Pet. App. 15a.

The hospital industry's position all along has been that it was folly for the Board even to try to develop a rule that would designate specific bargaining units as the only appropriate units in the industry because the great diversity in the industry makes such an approach inherently arbitrary and capricious. The Board acknowledged in *St. Francis Hospital* that the "diverse nature of the industry"—including both "small hospitals" and "large medical centers"—"precludes any generalization as to the appropriateness of any particular bargaining unit." 271 NLRB at 953 n.39. In the rulemaking, however, the Board completely reversed its position and claimed—supposedly based

[22] The court of appeals also implied that the hospital industry was partially responsible for the Board's decision to treat all hospitals as if they were alike because it "joined the unions in opposing a proposed distinction between hospitals having more than one hundred beds and hospitals having fewer." Pet. App. 14a. In actuality, the industry—while arguing that the number of beds did not adequately capture the differences between hospitals and that establishing bargaining units by rule was inherently arbitrary—agreed with the Board that a distinction should be made between large and small hospitals but proposed that the cutoff be set at a higher number than 100 beds. NPR II, J.A. 164.

on its experience in handling hundreds of hospital bargaining unit cases over the previous 13 years—that all such facilities were "remarkably uniform" and "virtually identical." NPR I, J.A. 12-14; NPR II, J.A. 188-189. The Board did not find that this supposed uniformity had suddenly developed in the last five years; and indeed, there was no evidence of any such radical change in the health care industry during that time. The Board simply jettisoned its previous findings concerning diversity in the industry.

The Board's new and drastically altered "findings" warranted more thorough analysis than that provided by either the Board or the court of appeals. The presumption in judicial review is "*against* changes in current policy that are not justified by the rulemaking record." *Motor Vehicle Manufacturers Ass'n* v. *State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 42 (1983) (emphasis in original). Because the Board's analysis directly conflicts with its longstanding assertion of the need for individualized unit determinations, the rulemaking analysis "is 'entitled to considerably less deference' than a consistently held agency view." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (citation omitted); *see also NLRB* v. *United Food & Commercial Workers Union*, 484 U.S. 112, 124 n.20 (1987).[23]

[23] The Board's decision to adopt *per se* rules must also be scrutinized especially carefully because there are indications in the record that the Board had already reached its conclusion that a blanket rule was appropriate before ever holding any hearings. This conclusion is strongly suggested by the following interchange between Board members and Bert Subrin, the Board's counsel:

> MR. SUBRIN: By announcing the rules first and then ending up with the same rule it sort of sounds as if you did it by fiat and used the hearing to justify what you already decided; whereas, if you used the evidence that you've taken at the hearing to justify the rules, it sounds as if you were a little more open minded.
>
> * * *

(Footnote continued on following page)

In fact, a close examination of "the whole record"—including "the body of evidence opposed to the Board's view" (*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 487-488 (1951))—shows that the Board's current claim is unfounded, and that its earlier assessment was the correct one. In health care, as in other industries, "[w]ide variations in the forms of employee self-organization and the complexities of modern industrial organization make difficult the use of inflexible rules as the test of an appropriate unit." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. at 134.

The Board offered no reason why evidence of differences among hospitals did not undercut its finding that "there are such similarities that certain institutions may properly be grouped as a class." NPR II, J.A. 53. It blithely disregarded hundreds of letters submitted by hospitals detailing their size and workforce structure and the effect that the rule would have on their institutions. See Final Rule, J.A. 205-207. The Board dismissed these submissions as "form letters" (*ibid.*), but in fact a great many of the hospitals provided specific examples, with quantified costs, of the impact of the rule.[24] By ignoring the extensive

[23] *continued*

MR. SUBRIN: Do you want discussion on whether there should be rulemaking? I would suggest that you just announce that the Board has decided to utilize [rulemaking] and instruct the law judges not to take evidence on that.

MEMBER BABSON: Absolutely. That bridge has been crossed.

Transcript of the NLRB Meeting of May 15, 1987, RM-2-A-1 at 18, 29, reproduced in AHA's Court of Appeals Supplemental Appendix at 348-349.

[24] A review of a representative sample of the letters submitted shows that hospitals provided specific details on the impact of the rule. These letters are included in the record below and were reproduced in AHA's Court of Appeals Supplemental Appendix ("S.A.") at 369-378 and 412-417. Hospitals presented evidence that, to cut costs while maintaining adequate staffing under increasing

(Footnote continued on following page)

testimony concerning the differences in hospital size, location, and operations, the Board impermissibly "failed to consider an important aspect of the problem" and reached a conclusion "that runs counter to the evidence" before it (*State Farm*, 463 U.S. at 43).[25]

In previous adjudications as well, the Board and its regional directors have made case-by-case findings that undercut the generalized conclusions adopted by the Board in the rulemaking proceedings.[26] Applying the very same factors allegedly taken into account in the rulemaking, the Board and its regional directors have often reached the

[24] *continued*
financial pressures, they have assigned employees to perform duties cutting across the traditional employment categories on which the Board's rules are based. See, *e.g.*, S.A. 370 (comment of Marshalltown Medical & Surgical Center). Contrary to the Board's unsupported conclusions, the letters showed that artificial divisions between bargaining units have already caused operating inefficiencies, including hampering transfers of employees to other jobs and prompting jurisdictional disputes. See, *e.g.*, S.A. 375-377 (comments of Michael Reese Hospital and Medical Center). The testimony detailed and quantified the costs that negotiations and strikes impose on a hospital—costs that are multiplied with each new separate unit. See, *e.g.*, S.A. 381-382 (comments of St. Luke's Memorial Hospital Center); S.A. 379-380 (comments of Gerald Champion Memorial Hospital); S.A. 415 (comments of Burlington Medical Center); S.A. 388-393 (testimony of Susan S. Robfogel).

[25] The arbitrariness of the Board's reasoning is shown by the fact that it concluded, on evidence quite similar to that presented by the hospital industry, that nursing homes should not be covered by the Rules because there are "significant differences between the various types of nursing homes which affect staffing patterns and duties." NPR II, J.A. 170. For example, the Board found it significant that nursing homes range in size from 10 to 500 patients and provide varying levels of care (NPR II, J.A. 166), but discounted the evidence that acute-care hospitals range in size from less than 25 beds to more than 1,000 and provide even more varying levels of care (compare the size and circumstances of Sitka Community Hospital with those of Michael Reese Hospital and Medical Center, S.A. 372-378).

[26] AHA has lodged copies of these decisions with the Clerk of the Court.

exact opposite conclusions in the light of particular factual circumstances. For example, while the Board assumed throughout the rulemaking that employees within a given classification at different hospitals perform essentially similar tasks, the Board had previously found that small or rural hospitals, given their limited resources, often required that employees perform atypical functions.[27] Likewise, the Board's assumption that so-called "skilled" maintenance employees invariably differ sharply in tasks and skills from other service and maintenance employees (NPR II, J.A. 132-149) is untrue at many hospitals where all maintenance workers assist in tasks throughout the hospital, coming in contact with service workers, and particularly where complex maintenance work is farmed out to independent contractors.[28] To give yet another example, the assumption that business clerical workers invariably differ from and have little contact with other non-professional employees is belied by the findings in numerous cases.[29]

[27] See, *e.g.*, *Jay Hospital*, No. 15-RC-7171, at 4 (1985) (smallness of hospital leads to high degree of interdependence and contact between different employees and departments); *Jewish Hospital Rehabilitation Center of N.J.*, Nos. 22-RC-9442, 22-RC-9443 & 22-RC-9444 at 12 (1985) (at 50-bed hospital, RNs and LPNs (which rules divide into separate units) have virtually identical functions and employment conditions); *Titusville Hospital*, No. 6-RD-973, at 15 (1986) (small size requires that LPNs sometimes fill functions of RNs); *Twin City Hospital Corp. Cases*, Nos. 8-RC-13686, 8-RC-13687, at 6 (1987) (at small hospital, medical technologists (whom rules place in separate technical unit) have to assume responsibilities of professionals, "develop[ing] greater skills and us[ing] greater discretion and judgment than would be necessary in a large facility").

[28] See, *e.g.*, *Wilmington Medical Center*, No. 4-RC-14780, at 2 (1985) (maintenance employees had frequent contact with other employees, and many had worked in service departments; while maintenance workers possessed some skills, complex work was performed by independent contractors); *St. Joseph Hospital*, No. 4-RC-14543, at 3 (1984) (while maintenance employees possessed a certain degree of skill, they had frequent contact with other employees and worked mostly outside their department, and complex maintenance work was performed by outside contractors).

Perhaps the most telling example is the Board's conclusion that technical employees must be in a separate unit from skilled maintenance employees. NPR II, J.A. 122-123. In reaching that conclusion, the Board compared the skills and working conditions of technical employees with those of service and maintenance workers, and in most respects avoided any comparison with the skilled maintenance unit it was also creating. *Id.* at 123-132. In fact, many of the factors the Board used to distinguish technical employees from service and maintenance workers (skill level, wages, education, licensure, separate supervision, limited contact with other employees) were used just a few pages later to distinguish skilled maintenance employees from other service and maintenance workers. *Id.* at 133-149. But more important is the fact that the Board concluded that it was necessary to separate the very same units it said in the ***Extendicare*** decision had to be combined to prevent "unwarranted unit fragmentation." 203 NLRB at 1233. ***Extendicare*** was not only noted with approval in the congressional admonition, but the decision in that case to combine technical employees and service and maintenance workers in a single bargaining unit was also used by the Administration during the legislative hearings as a prime example of how existing Board procedures would work to avoid undue proliferation of bargaining units. *1973 Hearings* at 427.

[29] In its rulemaking (J.A. 159-160), the Board admitted reaching the opposite conclusion in *Baker Hospital, Inc.*, 279 NLRB 308, 309 (1986) (clericals had same terms and conditions of employment as, and extensive contact with, service and maintenance workers). See also, *Santa Rosa Memorial Hospital*, No. 20-RC-15845, at 4 (1985) (geographic separation of certain finance employees insufficient to overcome other factors indicating community of interest with other non-professional workers).

Contrary to the court of appeals' assertion (Pet. App. 15a-16a), the arbitrariness of the Board's rule cannot be defended on the ground that numerous courts had rejected the Board's prior attempts to determine units on a case-by-case basis. The courts did not reject those efforts because the Board complied with the statutory requirement to determine the appropriate unit "in each case." Rather, the courts criticized the Board for failing fully to consider the effect of the proposed unit on the particular hospital involved. See, *e.g.*, *NLRB* v. *Frederick Memorial Hospital, Inc.*, 691 F.2d at 194-195; *NLRB* v. *HMO International/California Medical Group Health Plan, Inc.*, 678 F.2d at 812; *NLRB* v. *St. Francis Hospital of Lynwood*, 601 F.2d at 416.

The Board concedes that its rule designates as appropriate much the same eight bargaining units that it recognized between 1974 and 1984. Final Rule, J.A. 252. But designating the appropriate units by rule does not alleviate in any way the problem that led the courts of appeals to reject the Board's prior efforts. Instead, the Board's use of rulemaking merely compounds the problem by mandating that the differences between hospitals be ignored and by precluding any consideration of the appropriateness of the bargaining unit at the particular institution or of the possibility that approval of the unit would result in or lead to an undue proliferation of units.[30] By pretending against the weight of the evidence that all hospitals are alike, the Board's rule is inherently arbitrary and capricious.

[30] As Member Johansen aptly put it in his dissent from the Board's rulemaking, "unit specifications derived from a predetermined set of rules are inherently less flexible than those arrived at by decision in individual cases" and are subject to intense criticism whenever they are applied "on the ground that the Board has not arrived at a result through the application of its institutional expertise to a particular fact pattern." NPR II, J.A. 201.

It is easy to understand the frustration that led the Board to engage in rulemaking. In 1987 the Board complained that after "[t]hirteen years and many hundreds of cases * * * it is now no closer to successfully defining appropriate bargaining units in the health care industry than it was in 1974." NPR I, J.A. 9. But the answer to that complaint is neither to violate the statutory requirement of case-by-case unit determinations nor to ignore the differences among hospitals. Instead, it is to follow the procedure used with great success in every other industry over the past 55 years and to determine the appropriate unit in each case, taking into account the circumstances of the particular hospital and the possibility that approval of the requested unit would lead to proliferation. If the courts of appeals are in conflict over the proper standard the Board is to apply in determining unit appropriateness,[31] it should ask this Court to resolve that conflict. As tempting as it must have seemed, it is no solution to try to avoid any possibility of case-by-case judicial review by ignoring the requirements of the statute and the diversity of the industry.

[31] A conflict among the circuits was created by the decision of the District of Columbia Circuit in *International Brotherhood of Electrical Workers* v. *NLRB*, 814 F.2d at 704-705. As that court acknowledged, the courts of appeals disagreed over whether the Board was permitted to apply its usual "community-of-interests" standard to the health care industry or was instead required to apply a "disparity-of-interests" standard. See NPR II, J.A. 199 (Member Johansen, dissenting).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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